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No. 03-1046

IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

BOBBY GENE ALLEN AND DEBORAH JANE ALLEN, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF COUNCIL ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Council On State Taxation ("COST") respectfully requests leave to file a Brief as Amicus Curiae in support of Petitioner. The interest of COST as *amicus curiae* is described infra at Brief, pp.__. Counsel for Petitioner has consented to COST's filing of an *amicus* brief. Despite COST's qualifications to submit an *amicus* brief, Counsel for Respondent has refused to consent to the filing of such a brief. However, in the absence of such permission there are at least two reasons for granting this request.

First, with respect to the Petition filed in this case, COST has additional observations to make concerning the proper interplay between the scope of class-action certification and the proper functioning of state and local tax systems. In particular, COST will articulate the constitutional and practical implications raised by certification of a nationwide class-action when certification of the class itself threatens the

proper functioning of state and local legal structures. A full exposition of the controversy of this case by interested and eligible amici is ultimately to the benefit of the Court in its administration of writs for certiorari.

Second, because AT&T is but one of nearly six-hundred COST members that are required to collect sales taxes on behalf of states and local governments, COST is uniquely qualified to comment on the impact the decision by the Oklahoma Court of Appeals will have on multistate businesses.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. If the decision by the Oklahoma Court of Appeals is allowed to stand, AT&T and other similarly situated vendors will be forced to choose between the lesser of two evils—either liability for overcollection in a class action suit by customers or liability for undercollection from state or local governments as involuntary withholding agents—because given the current status of technology it is impossible for vendors to collect taxes from customers with absolute accuracy	5
II. The decision by the Oklahoma Court of Appeals cannot stand because it failed to consider the decision of this Court in *Shutts* requiring the certifying court to apply the laws of the state in which each individual claimant resides	11
III. The sales tax complexity underlying the litigation is one of the subjects addressed by the Streamlined Sales Tax Project, a national effort currently underway to simplify the sales tax structure pursuant to this Court's decision in *Quill*	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page

Allstate Ins. Co. v. Hague, 449 U.S. 302, 333 (1981)..... 12, 14
Davidson v. Rochester Tel Corp., 558 N.Y.S.2d 1009, 1011 (App. Div. 1990)..... 13
City of Phila. v. Cohen, 184 N.E.2d 167, 169 (N.Y. 1962)..... 13
Ferguson v. Kroger Co., 37 S.W.3d 590, 592 (Ark. 2001)..... 13
Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930)...
Larrieu v. Terrebonne Parish Sales and Use Tax, No. 2003 CA 0934, 2004 WL 326455 (La. App. Feb. 23, 2004)..... 2
Larrieu v. Wal-Mart Stores, Inc., No. 2003 CA 0600, 2004 WL 324962 (La. App. Feb. 23, 2004)..... 1
Pacific Employees Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939)..... 14
Phillips Petroleum Co. v. Shutts et al., 472 U.S. 797 (1985)..... 2, 11
P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp., No. 2-02-1219, 2004 WL 171546 (Ill. App. Ct. Jan. 27, 2004)..... 1
P.R. Mktg. Group Inc. v. GTE Fla., Inc., 747 So.2d 962 (Fla. Dist. Ct. App. 1999)..... 13
Quill Corporation v. North Dakota, 504 U.S. 298 (1992)..... 18
Serna v. H.E. Butt Grocery Co., 21 S.W.3d 330, 333 (Tex. Ct. App. 2000)..... 13

UNITED STATES CONSTITUTION

U.S. Const. Amend. XIV, § 1..... 12

TABLE OF AUTHORITIES—Continued

STATUTES

Page

Texas Tax Code Ann. § 112.53(a)..... 13

OTHER AUTHORITIES

Streamlined Sales Tax System Act, 2003 Okla. Laws 413..... 18, 19

INTEREST OF THE *AMICUS CURIAE*

The Council On State Taxation (COST) submits this brief as *amicus curiae* in support of Petitioner in the above-captioned matter.[1]

COST is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. In that role COST monitors and works to improve the administrative obligations imposed on businesses by state and local revenue systems. COST represents nearly 600 corporations including companies from every industry segment.

The present case directly impacts the complexity and fairness of our country's system of raising revenue for state and local governments, thus COST seeks to express its view point regarding the case in furtherance of its mission. While the present litigation involves sales taxes collected by a telecommunications company, the decision has broader implications for any tax that vendors are obligated to collect. Use of nationwide class-action suits in the tax arena has begun to spread to other taxes and is taking place in numerous states.[2] Unchecked, such litigation threatens the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consent of the Petitioner has been obtained and filed with the Clerk of the Court.

[2] *See P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, No. 2-02-1219, 2004 WL 171546 (Ill. App. Ct. Jan. 27, 2004) (the Illinois Court of Appeals certified a class-action spanning seventeen states for refunds of taxes collected by Nextel. Nextel based its determination of collection on zip code and incorrectly assessed tax on certain residents outside of incorporated city limits. The Court failed to appreciate that it was a refund of taxes and focused on a deceptive practice claim submitted by the plaintiff in certifying the class.); *Larrieu v. Wal-Mart Stores, Inc.*, No. 2003 CA 0600, 2004 WL 324962 (La. App. Feb. 23, 2004) (the court dismissed a class-action lawsuit against Wal-Mart for the overcollection of taxes on prepaid calling cards because the purchasers failed to pursue

orderly and effective administration of state and local revenue systems between government and business.

We understand that the Multistate Tax Commission (an association representing state tax administrators) is also filing a brief as *amicus curiae* in support of the Petitioner. Over the past thirty years the Multistate Tax Commission and COST have filed briefs in almost every significant state and local tax case before this Court. This case represents the first instance in those thirty years in which the two organizations will file in support of the same party, demonstrating the threat posed to both business and government by the decision below.

COST submits this brief to encourage the Court to provide necessary guidance in an area that affects all of its members. Specifically, COST hopes that the Court will articulate a standard for certification of nationwide class-action suits under *Phillips Petroleum Co. v. Shutts et al.*, 472 U.S. 797 (1985) when certification itself impinges on the proper functioning of state or local tax code provisions. Without the Court's guidance, businesses will be subject to an increasing number of shotgun-approach class-action suits that threaten the proper functioning of state and local revenue systems. Correspondingly, state and local governments will be forced to adjust the way they rely on businesses to act as their collection agents. By granting the Petition for Certiorari, this Court can clarify the interplay between the standards for certification of class-action suits and the proper functioning of state tax laws.

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the available administrative remedies, there was no cause of action against the vendors because they did not exceed their authority, and purchasers could not recover from the amounts the state allows Wal-Mart to retain under the theory that it was compensation.); *see also, Larrieu v. Terrebonne Parish Sales and Use Tax*, No. 2003 CA 0934, 2004 WL 326455 (La. App. Feb 23, 2004) (decided on the same day as *Wal-Mart* for the same reasons.)

SUMMARY OF THE ARGUMENT

A foundation of tax law in this country is withholding taxes. State and local governments create an incentive for corporations to collect from customers and remit the collected amounts to the taxing authority by making the corporation liable for undercollection. The decision by the Oklahoma Court of Appeals creates an additional liability for over-collection payable to customers. Due to the complexity associated with the multiple tax jurisdictions and the changing tax boundaries, AT&T is unable to comply with the tax laws with absolute certainty given the current technology. Thus, AT&T is in the unenviable position of choosing between exposing itself to overcollection liability to customers or undercollection liability to state and local tax jurisdictions.

In evaluating the liability, AT&T and other similarly situated vendors must consider that exposure in the case of undercollection occurs only in the case of an audit by the taxing jurisdiction. Risking a potential audit is preferential to certain exposure for a class-action claim. Therefore, the decision below destroys the corporate incentive to collect and remit withholding taxes because of the possible liability for overcollection.

The plaintiffs are attempting to exploit AT&T's unenviable position by framing the issue as non-tax to justify a refund directly from AT&T rather than the taxing authority that currently has the money. The Court should reverse the decision below and require plaintiffs to seek refunds by following the administrative process in their state.

Beside the practical result of the decision, impacting vendor collection of taxes for state and local governments, the decision also violates state sovereignty in the administration of substantive state tax laws. The Oklahoma Court of Appeals completely ignored the substantive rules of twenty-seven other states included in the nationwide class action.

Oklahoma may certify a class for Oklahoma residents, even though it seems contrary to their own statutory policy, but Oklahoma cannot impose its decision on twenty-seven other states which have a right to administer their tax laws and policies as they see fit.

This Court enunciated this restriction in *Shutts*. The court below failed to even address the *Shutts* decision in applying its own substantive law across twenty-seven other states. Allowing the Oklahoma decision to stand impinges on the other twenty-seven states' ability to administer their specific tax codes. Many states, including ones certified in this class, do not allow direct action against vendors, but rather require the taxpayer to follow administrative procedures to obtain a refund. States realize that vendors do not want to collect taxes for them. If, as an incentive, a state wishes to protect a vendor from exposure to liability for being an agent of the state, then that is the state's prerogative because the overcollection occurs as a result of AT&T's attempt to comply with the applicable tax code. States, such as Oklahoma, must respect the decision of another state regarding the determination of how to administer its tax code among itself, its forced collection agents and its taxpayers. The Oklahoma decision must be reversed so as to respect the sovereignty of the other twenty-seven states.

The Streamlined Sales Tax Project is just one example of state interaction with corporations to solidify the collection relationship for which the decision below could interfere. While, the SSTP rules were only effective as of November of 2003 in Oklahoma, the clear meaning is that each state should decide what is appropriate in the interplay between the state, the vendor and the taxpayer regarding withholding taxes. Specifically, the SSTP provides explicit refund options for customers and hold harmless provisions to protect vendors. Individual states should be able to adopt the SSTP provisions without concern that a court in another state may interpose itself between the state and its collection agents. In the

decision below, the Oklahoma Court of Appeals improperly imposed its will on other states.

ARGUMENT

I. If the decision by the Oklahoma Court of Appeals is allowed to stand, AT&T and other similarly situated vendors will be forced to choose between the lesser of two evils—either liability for over-collection in a class action suit by customers or liability for undercollection from state or local governments as involuntary withholding agents—because given the current status of technology it is impossible for vendors to collect taxes from customers with absolute accuracy.

This case involves the proper interplay between the scope of class–action certification and the proper functioning of state and local tax systems. As indicated in the Petition for Certiorari, two Oklahoma customers sued Petitioner in Oklahoma on behalf of Petitioner's customers located in Oklahoma and twenty-seven other states. The Oklahoma customers contended that Petitioner fraudulently collected sales tax from customers residing on the borders of municipal taxing jurisdictions in each of the twenty-eight states.[3] The Court below, by allowing the Oklahoma customers to sue on behalf of customers in other states, in disregard of the legal structure in those other states, threatens the stability and certainty of state and local revenue administration nationwide.

The first key to comprehending the repercussions of this case on state and local revenue systems is an examination of the overall state and local tax structure and the nature of Petitioner's role in collecting sales tax for state and local

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[3] AT&T does not challenge the certification of the class for Oklahoma, only with respect to the other twenty-seven states.

governments. A multitude of different statutes varying from state-to-state within the scope of the class-action require the Petitioner to correctly calculate, collect, and remit sales tax to each of the state and local taxing jurisdictions in which it does business. Nationwide the number of independent taxing jurisdictions (states and the localities within them) easily exceeds seventy-five-hundred. AT&T, like most major corporations in America, does business in every state and the corresponding thousands of local taxing jurisdictions and as such serves as an involuntary tax collector for each of those governmental authorities.

AT&T, like every other business in the country, is legally obligated to serve as a collection agent for state and local taxing authorities. As the involuntary collection agent, AT&T is liable to the taxing jurisdiction if it fails to collect or undercollects taxes which a taxpayer owes to the state or local government. In addition, AT&T is liable to the taxing jurisdiction if it collects but does not remit all collected amounts to the taxing authority. Corporations, such as AT&T, consent to and accept the laws of the state and local governments when operating in the jurisdiction. AT&T relies on the legal structures of these jurisdictions to resolve controversies and provide protection from consumer refund suits.

Absent the decision by the Oklahoma Court of Appeals, undercollection liability to the taxing authorities would be the extent of AT&T's liability regarding the collection and remittance of taxes to state and local governments. Now, AT&T and other vendors also face liability for overcollection of taxes from customers on behalf of state or local government, notwithstanding the fact that AT&T is only an agent and no longer in possession of the money for which the plaintiffs seek a refund.

If it were possible to comply with the taxing statute and collect the correct amount from the right payers without fail, then AT&T would do so to avoid the risk of liability for

either overcollection or undercollection. AT&T attempts to comply with the state and local tax authorities to the best of its abilities. To that effect, AT&T, like other multistate businesses, spends many millions of dollars each year monitoring the multitude of various tax laws for each jurisdiction in which it operates. Each jurisdiction defines its own tax base, tax rate, rules for sourcing the transaction to determine where the tax is owed, rules for mathematical rounding, and a litany of rules for reporting and remitting collected taxes. Many jurisdictions may impose more than one tax on any particular transaction, thereby compounding the complexity of the applicable rules and reporting requirements. For instance, a typical phone bill may impose as many as three to four different types of taxes.[4]

In addition to the basic procedural and substantive imposition statutes, taxing jurisdictions (particularly at the municipal level) are notorious for regularly changing their tax rates and even worse, changing the boundaries of the taxing jurisdiction itself. While there are publications and software companies that attempt to capture the tax rates, and changes to those rates, imposed by each of the jurisdictions, there is no centralized source of information for businesses to use in determining tax jurisdiction boundaries and tracking their changes. Determining whether a particular address is inside a municipal taxing jurisdiction when the mailing address includes the name of the municipality but the physical location may or may not be inside the incorporated area is one of the most difficult areas of administering sales tax law. It is exactly this difficulty which the Oklahoma customers are attempting to exploit in the present class-action suit.

AT&T is merely attempting to comply with what the government requires of every corporate citizen; collect taxes from its customers based on the best information and software systems available and remit the collected amounts to

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[4] Federal, state, county and city for example.

the taxing jurisdiction. Because of the complexity of the state and local tax structure it is impossible for any business, including AT&T, to calculate, collect, and remit the government imposed taxes without error. The type of "zero margin for error" the plaintiff advocates, approved of by the Oklahoma Court of Appeals, puts AT&T in the position of choosing to expose itself to class-action liability for overcollection or liability to the state for undercollection.

AT&T and other similarly affected vendors acting as involuntary collection agents must evaluate the risk of these opposing liabilities. Clearly, a corporation seeks to limit all liability if possible, but in this instance a corporation can only limit one liability and accept exposure to the other. AT&T must choose between the lesser of two evils.

Exposure to liability to the thousands of taxing jurisdictions occurs on a jurisdiction-by-jurisdiction basis because liability attaches only after each individual jurisdiction audits a business' collection methodology and assesses the business on the undercollected amount. There is a certain "audit roulette" mentality inherent in evaluating the possible liability to taxing jurisdictions which almost certainly guarantees that the probability of facing liability in every jurisdiction is less likely (and thus less costly) than facing global liability for overcollection through class-action litigation as in the present case. By erring on the side of undercollection a company can eliminate class-action exposure entirely and face the audit risk that only a few of the local taxing jurisdictions would have the wherewithal to audit the company. In short, the Oklahoma decision creates an incentive for vendors to undercollect and play "audit roulette" rather than attempt to properly collect and remit to the states.

This disincentive to collect taxes on behalf of the government is a perversion of the state and local tax system and is anathema to our country's model of vendor collection on behalf of government. The system of taxation in this country

depends upon withholding taxes. Corporations collect these taxes not because they want to, but because of government requirements and imposition of liability for failure to comply. Allowing this decision to stand could cause this system to suffer in the future.

COST is not the only organization aware of and concerned with the impact of this decision. The decision concerns the states themselves. While the state of Oklahoma is not directly involved in this litigation, tax administrators involved in the Multistate Tax Commission (which includes Oklahoma as an Associate Member) voted to file an *amicus curiae* brief in support of AT&T's Petition for Certiorari. While both the MTC and COST have filed *amicus* briefs in each of the important tax cases in the past thirty years, this case represents the first time in those thirty years in which the MTC and COST will file an *amicus* brief in support of the same party.

As a representative of tax administrators throughout the country, the Multistate Tax Commission's concern lies with the violation of state sovereignty by the Oklahoma court. It is no wonder that the Multistate Tax Commission's members voted to support AT&T's Petition for Certiorari.[5] Even state tax administrators recognize that AT&T is acting as their collection agent and that the Oklahoma court completely ignored their states' statutory remedies for obtaining a refund and their states' prohibition on suits against the vendor.

There are two additional points to consider in evaluating whether to accept the Petition for Certiorari and overturn the decision in this case. First and foremost, this case is about taxes. Even though the plaintiffs presented, and the Oklahoma court accepted, a paradigm that their suit is not for a

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[5] Each of the twenty-eight states covered by the class certification here are members of the Multistate Tax Commission, including Oklahoma, an Associate Member. *See* http://www.mtc.gov/default.htm#membership.

refund of taxes paid, that is exactly what the plaintiffs seek. Put quite simply, absent the taxing statutes making AT&T an involuntary collection agent the plaintiffs would not have sued AT&T.

Unlike other types of class-action litigation, AT&T's behavior here is affirmative conduct driven by statutory obligation as an agent of the state. State and local jurisdictions' tax laws obligate businesses to collect taxes. State and local jurisdictions' tax laws specify how to handle challenges to and refunds of collected amounts. This case is a tax matter over which each sovereigns' tax statutes, not general liability for tortious behavior, should control.

Second, the vendors, including AT&T, acting as collection agents for the taxing authority do not financially benefit from their statutory obligation; vendors are legally obligated to turn over collected amounts to the appropriate governmental unit.[6] Even in the case of an erroneous overcollection, as plaintiffs contend occurred here, businesses turn over the "excess" amounts to the appropriate government authority.

Because the twenty-seven other states are not party to the litigation, never mind that the Oklahoma court specifically ignored the law in those jurisdictions, the decision of the Oklahoma court has no binding effect on the taxing authorities in each of the thousands of state and local jurisdictions impacted. Thus, adding insult to injury, if the decision below stands, AT&T is on its own in attempting to

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[6] AT&T's Petition makes reference to state provisions that allow businesses to recoup a small portion of the administrative costs associated with their tax collection duties. These vendor compensation provisions, as they are commonly called, exist in very few states (approximately eighteen) and even in the states where they do exist, the provisions do not come close to fully compensating retailers for the true expense involved in collecting the tax. Receipt of vendor compensation does not turn tax collection work into a profit center.

recoup from the taxing authority amounts possibly paid out as refunds to customers for overcollected taxes.

The ultimate result is that AT&T pays the collected amounts to the state and local governments (under a system so complex that no one and no software program can do the job with 100% accuracy), then refunds such amounts to the customers (and their class-action attorneys), and is then required to follow the administrative rules and law in each jurisdiction, with little hope, to obtain a refund from the state or locality. AT&T is thus subject to rules which the plaintiffs here are circumventing. The end result will be that AT&T is unable to recoup money that it refunded to the plaintiffs because of expired statutes of limitation, different interpretation of the state laws at issue, or the inefficiency of being forced to pursue claims in each of the thousands of jurisdictions – a job that the class-action members are trying to avoid. Finally, AT&T may be unable to obtain refunds in the various jurisdictions because of statutory provisions that ironically provide a remedy only to AT&T's customers.

II. The decision by the Oklahoma Court of Appeals cannot stand because it failed to consider the decision of this Court in *Shutts* requiring the certifying court to apply the laws of the state in which each individual claimant resides.

The Oklahoma Court of Appeals' decision below violates this Court's holding in *Phillips Petroleum Co. v. Shutts et al.*, 472 U.S. 797 (1985). The Court in *Shutts* describes the circumstances under which the Due Process and Full Faith and Credit clauses require that a state court, when exercising jurisdiction over a nationwide class-action, apply the law of the states in which each individual claimant resides. The Oklahoma Court completely disregarded its constitutional obligation under *Shutts*.

In *Shutts* this Court reversed the decision of a Kansas court that improperly applied Kansas law upon nonresidents to

determine the value of their claims. Although the class-action itself was allowed to go forward, the Kansas Court was required to apply the laws of each state to determine the appropriate extent of the defendant's liability to non-Kansas residents included in the class. The Court held that application of Kansas substantive law upon nonresidents violated the constitutional limitations on choice of law mandated by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution. In reaching its decision this Court stated:

> "Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests" in order to ensure that the choice of Kansas law is not arbitrary or unfair. *Allstate*, 449 U.S., at 312-313, 101 S.Ct., at 6390640. Given Kansas' lack of "interest" in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits"[7]

The Court found that Kansas law conflicted with the substantive law in other jurisdictions covered by the class certification, thereby making it inappropriate for the Kansas court to apply its own law to the claims of nonresident class members. In support of its decision the Court in *Shutts* used the example of an Oklahoma statute excusing liability for interest payments while Kansas law did not provide such protection. To then allow Kansas law to be applied to the entire class (including the claims of Oklahoma residents) could create liability for the defendant to Oklahoma claimants for which Oklahoma would not recognize as valid.[8]

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[7] *Shutts*, 472 U.S. at 821.

[8] *Id.* at 818.

The *Shutts* rational requires that the Oklahoma court here apply the substantive law of the other twenty-seven states included in the certified class. The Oklahoma court failed to consider that some individual states' substantive law prohibits customers from making such claims against the vendor.[9] The Oklahoma court also failed to consider that some individual states' substantive law prohibits class-action litigation for overcollected tax.[10] While *Shutts* involved conflicts of law over the amount of each claim (as determined by state law) this suit presents an even more compelling conflict in state law—over the very existence of a claim against the vendor or ability to sue vendors in class-action.

Each state enacts its own set of administrative rules governing claims for the refund of taxes. A court lacks jurisdiction to consider the merits of a taxpayer's claim unless and until a claimant meets a states' statutory requirements for exhausting administrative remedies and attempting to resolve the matter through set administrative channels. By asserting its jurisdiction to hear the claims of a nationwide class, the Oklahoma court ignored the statutory schemes and procedures put in place by each of the twenty-seven other states

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[9] *See Davidson v. Rochester Tel Corp.*, 558 N.Y.S.2d 1009, 1011 (App. Div. 1990) (holding that "[a] dissatisfied taxpayer's recourse is . . . against the taxing body" not the vendor.); *Serna v. H.E. Butt Grocery Co.*, 21 S.W.3d 330, 333 (Tex. Ct. App. 2000) (Texas law does "not contemplate direct action against the vendor who collects the sales tax on the state's behalf."); Texas Tax Code Ann. § 112.53(a) (specifies suits for refunds must be against the comptroller and attorney general.); *P.R. Mktg. Group Inc. v. GTE Fla., Inc.*, 747 So.2d 962 (Fla. Dist. Ct. App. 1999) (holding in the case of tax refund claims, other than the constitutionality of the tax, the Florida Tax Code administrative remedies are the exclusive remedies.)

[10] *See City of Phila. v. Cohen*, 184 N.E.2d 167, 169 (N.Y. 1962) ("[f]or our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State."); *Ferguson v. Kroger Co.*, 37 S.W.3d 590, 592 (Ark. 2001) (a state court is "without jurisdiction to order the treasuries of another state to refund tax revenues.").

regarding their methods to resolve tax disputes. Oklahoma justifies its action by seeking to frame the issue as non-tax, but clearly absent the tax statutes mandating AT&T to collect taxes there would be no overcollection of tax to resolve.[11]

Application of Oklahoma law to all members of the class-action violates the constitutional principles articulated in *Shutts*. Use of Oklahoma's substantive law (allowing suits against the vendor and class-action certification) will result in liability to claimants in other states who, under their own states' laws would not have a claim. Application of Oklahoma law across 27 other states is accordingly "sufficiently arbitrary and unfair as to exceed constitutional limits" as it was to apply Kansas law to other states in *Shutts*.

Furthermore, in the context of fairness this Court looks to the expectations of the parties. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 333 (1981). In *Shutts*, the Court considered the fact that when the parties executed the leases, the parties outside of Kansas had no expectation that Kansas law might control.[12] Thus, while neither the Due Process nor the full faith credit clause requires a state, such as Oklahoma, to substitute the conflicting laws of another state to determine the outcome of an Oklahoma decision regarding persons and events within the state, *Pacific Employees Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939), Oklahoma "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930).

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[11] Clearly AT&T does not want to be a tax collector for governments. As a collector, AT&T is not fully compensated for the cost, is subject to under-collection liability and now, facing this decision, is open to class-action attack. If there is any question that vendors do not want to collect taxes, one only need look at the multitude of cases in which vendors seek to avoid nexus and the requirement to collect use tax.

[12] *Shutts*, 472 U.S. at 822

Turning to AT&T, there could be no possible expectation of having to defend against a lawsuit in Oklahoma from plaintiffs in other states involving tax collection statutes in such other states. In other words, AT&T should be able to expect enforcement of tax collection statutes by each state and within each state, and not on terms dictated by an Oklahoma court under Oklahoma law. Each state has its own rules, regulations and standards dealing with vendors and taxpayers. It is only reasonable for businesses and taxpayers in a state to expect that their state's law will govern their conduct.

While, the Court in *Shutts* held that nationwide certification was allowable under Due Process, the Court reiterated that the plaintiffs consent to jurisdiction had no impact on the choice of law, else it would create an open invitation to forum shop.[13] In *Shutts*, Kansas sought to apply its law on the theory that the law of the forum state controls absent a compelling reason to use another state's law; this Court rejected the argument as "bootstrapping". Class-action statutes require a common issue of law or fact, and while a state can assume jurisdiction over a plaintiff whose principal contacts are with another state, the assumption of jurisdiction has no place in determining the application of substantive law. A state "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law."[14]

A similar issue exists in the current case. Oklahoma justifies certifying the class as having common questions of law based on its review of Oklahoma law (which it incorrectly believes allows class-action litigation against vendors for overcollected sales tax) and completely ignores

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[13] *Id.* at 820.

[14] *Id.* at 821.

the law in the remaining twenty-seven states. While all of AT&T's customers may be making a claim based on similar facts (living outside the technical boundary of a municipal taxing jurisdiction), legally each state defines differently the existence or nonexistence of the consumer's claim, and who the claim may be made against. In particular, many of the states covered by the certification here have distinct legal structures that control whether a customer can sue a vendor or utilize class-action litigation to pursue a claim for overpaid sales taxes. Some of the states specify that such claims may only be made against the taxing authority (which in fact has received the money).

A fact about this case (and all other similar class-action suits for overcollected tax) that distinguishes it slightly from *Shutts*, (where there was a single defendant subject to claims by multiple plaintiffs) is that AT&T is representing the interests of the thousands of true defendants in the case (the tax administrators from each jurisdiction engulfed in the class-action). In *Shutts*, there was one defendant being brought into one Court in one State where at least the defendant and a couple of the plaintiffs had a connection to the state; even so, this Court held that the law governing the claimants against that defendant must be the law of each state from which the claimants hailed. In the present case the defendant is the surrogate for the thousands of tax administrators from twenty-seven other states and related thousands of local jurisdictions within those states. Here the claimants themselves and the real (though not present) defendants are all from states that have no connection to Oklahoma.

The Court's analysis in *Shutts* requires application of the substantive law of the state of the claimant when failure to do so would violate the constitutional protections afforded the defendant. In *Shutts* the issue was the application of interest rates to determine the value of the individual claims. In the current situation certification should not have occurred because the substantive law of some of the states included in

the class-action declares that no action may lie against the vendor. This Court must review the Oklahoma court's decision and apply *Shutts* to clearly articulate a standard for class certification which protects the right of individual states to administer their own tax code and to insulate vendors serving as collection agents from suits for tax refunds when the funds involved were collected in trust and turned over to the taxing authority. Federalism allows states to define protections for their businesses and citizens. Due Process and the Full Faith and Credit clause require states to respect each others choices.

The Oklahoma court decided that tax refunds may be obtained from vendors via class-actions in that state, (although contrary to the state's own statutory provisions). That decision is the province of Oklahoma law as applied to Oklahoma residents. What this Court must prevent is Oklahoma applying its legal standards in other states to determine the interaction and legal relationships between their taxpayers, vendors (as collection agents), and their taxing authorities. If a state chooses to grant immunity to its vendors, Oklahoma has no right to interfere with that sovereign decision.

III. The sales tax complexity underlying the litigation is one of the subjects addressed by the Streamlined Sales Tax Project, a national effort currently underway to simplify the sales tax structure pursuant to this Court's decision in *Quill*.

The Streamlined Sales Tax Project (SSTP) is an effort to simplify and rationalize the sales tax structure that involves forty-two of the forty-six states (including the District of Columbia) which impose a sales tax.[15] Of the twenty-eight

[15] Information about the Streamlined Sales Tax Project can be found on the project's website at http://www.streamlinedsalestax.org. The site includes a copy of the multistate simplification Agreement and information about the participating states.

states covered by the class-certification, all but two (Colorado and Alaska), are part of the simplification effort. The SSTP is an attempt to simplify the sales tax structure in an effort to implement this Court's requirement in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), that the states not burden interstate commerce in their effort to require remote vendors to collect sales tax for all states. While the issue of remote collection of sales tax is not relevant to the present litigation, the simplification effort itself recognizes the role that businesses have played as the collection agents for state and local government. In that regard, the effort seeks to simplify (on a nationwide basis) state and local sales tax structures by requiring all taxing authorities to use uniform base definitions, uniform sourcing rules, limited number of rates per jurisdiction, and requires numerous other uniform administrative procedures. To the extent that the effort does not simplify the sales tax system (it still allows each local jurisdiction to impose its own tax as opposed to proposals that would allow only one sales tax rate per state) the simplification effort promises to provide software to calculate, report, and remit the sales tax for vendors. The system being developed promises that states will provide a zip-plus-four database of tax rates by jurisdiction and, for vendors who rely on state provided data and software, the states promise to hold vendors harmless for errors in tax calculation and remittance. In addition, the states have provided specific refund procedures for customers to follow before any cause of action may accrue.[16]

While Oklahoma is one of the states participating in the simplification effort, its statutory changes (including the hold

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[16] *See* Diane L. Hardt, Douglas L. Lindholm & Stephen P.B. Krantz, *The Lawmaker's Guide to the Streamlined Sales Tax Project 2003, The Year of Decision* (2003); Streamlined Sales Tax Agreement, §§ 306 and 325, *available at* http://www.streamlinedsalestax.org/FinalAgreement Adopted11-12-02.pdf.

harmless for vendors and the customer refund procedures) did not take effect until November 2003.[17] Accordingly, the SSTP hold harmless provision was not argued below. Even so, the Oklahoma Court of Appeals refused to even consider the law in the other twenty-seven states (including the 25 SSTP participants) and whether those sovereign jurisdictions had chosen to protect their tax collectors (businesses) from the type of litigation and potential liability that now threatens AT&T.

The Oklahoma decision threatens the balance of power that exists in our federalist system and threatens the progress that has been made implementing this Court's guidance in *Quill*. While Oklahoma courts are free to ignore their own statutory provisions (which can be addressed by the state's legislative process), allowing an Oklahoma court to ignore the statutory protections that other states have granted their taxpayers cannot be remedied by the states themselves and must be addressed here.

CONCLUSION

Local, State and Federal governments alike are dependent upon revenues raised by taxes to provide services. A multitude of tax systems within the United States function based on withholding and remittance by businesses; income taxes, sales taxes, gross receipts taxes, unemployment taxes, employment taxes, social security taxes, alcohol and cigarette excise taxes, motor fuel taxes, to name a few. Absent withholding, it is unlikely that any level of government would receive the necessary amount of tax to meet its fiscal obligations. States understand that in forcing vendors such as AT&T to choose between two evils, exposure to class-action or exposure to audit risk, vendors must select the least likely and least expensive risk, the lesser of two evils. In the

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[17] Streamlined Sales Tax System Act, 2003 Okla. Laws 413

present situation that means vendors will err on the side of undercollecting sales tax to avoid nationwide class-action exposure. The result is a clear threat to established compliance expectations for government.

If compliance with the complexity of the sales tax structure in over 45 states, DC, and thousands of local jurisdictions were possible, then vendors could collect without fear of exposing themselves to a class-action suit for over-collection. Reality demonstrates that AT&T or any other vendor relying on customer addresses in making taxability determinations will be unable to tax with 100% accuracy.

AT&T merely is a collection agent; the proper defendant is the applicable taxing authority. A customer can seek a refund from the taxing jurisdiction by following the appropriate administrative process, while this does not aid the class-action bar; it is the proper way to administer a refund. AT&T never benefited from the collection of the sales tax from the consumer, so they should not be subject to granting refunds for money not in their possession—AT&T merely collected per instructions from the taxing authority.

Additionally, this Court should consider not just the impact of this case, a sales tax collection case, but for taxes in general. Allowing this ruling to stand could also impact other taxes. The impact could have a crippling effect not just on the collectors forced to return money they do not possess, but also on the taxing jurisdiction because collection agents will under-collect to protect themselves from class-action litigation.

For the reasons stated above, COST respectfully requests the Court to accept this case for review.

Respectfully submitted,

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